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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-337

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs-Appelees,

against

LOUIS J. FRANK, Individually and as Police Commissioner of Nassau County, FRANK DORAN, Individually and as town attorney for the Town of North Hempstead and HOWARD EINHORN, Individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 501 F.2d 18. The opinion of the United States District Court for the Eastern District of New York is reported at 364 F. Supp. 478.

Jurisdiction

The final judgment of the United States Court of Appeals for the Second Circuit was entered June 25, 1974 (J. S. 1a). Notice of Appeal to this court was filed with the Court of Appeals on August 8, 1974 (J. S. 27a*). This appeal was docketed by filing a jurisdictional statement on September 25, 1974, and this court noted probable jurisdiction on January 20, 1975. The jurisdiction of this court rests, on 28 U.S.C. 1254(2), because the Circuit Court of Appeals has held a state statute repugnant to the United States Constitution. A municipal ordinance (Local Law) is a state statute under 28 U. S. C. 1254(2). *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77 (1958); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134 (1962); *Stern & Gressman*, Supreme Court Practice, 31, 32 (1969).

Questions Presented

1. Whether the Town of North Hempstead may constitutionally prohibit "topless dancing"?

2. Whether the traditional rules of comity and equity required the Federal courts to abstain from exercising their jurisdiction where a state criminal proceeding was commenced one day after plaintiffs commence Federal Civil Rights Action for injunctive and Declaratory relief in the United States District Court?

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* References to "J.S." are to the Jurisdictional Statement. References to "A" are to the single appendix.

Relevant Provisions of Local Law No. 1 of 1973 of the Town of North Hempstead

Town of North Hempstead

Local Law No. 1 of 1973

A Local Law Prescribing the Regulation of Cabarets, Bars, Loungers, Dance Halls, Discotheques and Other Public Places in General.

Section 1.0—Legislative Purpose

It is hereby declared the policy of the Town Board of the Town of North Hempstead, County of Nassau, State of New York, that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated area of the Town of North Hempstead, it is necessary to regulate and control the operations of public places used as cabarets, bars or lounges, dance halls, discotheques and other public places in general so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and of persons employed, whether for hire or not, in such establishments.

Section 2.0—Definitions

1. Public Place—Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes: or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term "public place", where used in this law, shall include the term "public assembly" or "assembly" as may be used in other codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead.

2. Cabaret—Any public place directly or indirectly selling or serving food, drink, or alcoholic beverages to the

public and in which any musical entertainment singing, dancing in a designated area, or other form of amusement is also permitted, and shall include such a room, place, or space which provides incidental musical entertainment by mechanical devices with or without dancing.

3. Bars, Lounges or Discotheques—Any public place in which the business of directly or indirectly selling and/or serving food, drink, or other beverages to the public is conducted and in which any musical entertainment, singing, dancing in a designated area or other form of amusement is also permitted, and shall include such a room, place or space which provides incidental musical entertainment by live musicians or mechanical devices with or without dancing.

4. Dance Halls—Any public place in which dancing is carried on and to which the public may gain admittance either with or without the payment of a fee.

5. Person—An individual, partnership, club, association, corporation, society, or any other organized group of persons and shall include officers, directors, stockholders, partners and trustees of a club, corporation, partnership, association, or society.

6. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other persons who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly

covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. References to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret bar and/or lounge, dance hall, or disclotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

SECTION 4.0—PENALTY

Any person who shall violate any section of this local law shall be guilty of a violation punishable by a fine not exceeding Five hundred ($500.00) Dollars, or imprisonment for a period not to exceed fifteen (15) days or both. Each day's continued violation shall constitute a separate violation.

SECTION 5.0—EFFECTIVE DATE

This local law shall take effect immediately upon the filing with the Secretary of State.

Dated: Manhasset, New York, June 10, 1973.

BY ORDER OF THE SUPERVISOR AND THE TOWN BOARD OF THE TOWN OF NORTH HEMPSTEAD
WILLIAM H. RYAN, JR.
Town Clerk

MICHAEL J. TULLY, JR.,
Supervisor.

Facts

North Hempstead is a town located in northwest Nassau County on Long Island, New York, and has a population of some 242,000 persons. It is adjacent, on its western boundary to the Borough of Queens, City of New York.

On July 10, 1973, after publication of a proposed local law, a public hearing was held and Local Law No. 1 of 1973 was unanimously adopted by the Town Board and filed with the Secretary of State of the State of New York, and became effective July 16, 1973. Local Law No. 1 of 1973 makes it unlawful to offer, present or perform what is commonly known as "topless dancing" in bars, lounges, cabarets, dance halls, discotheques or any other public place within the Town of North Hempstead (A 13).

Plaintiffs, Salem Inn, Inc., Tim-Rob Bar, Inc., and M & L Rest, Inc. own and operate bars in the Town of North Hempstead in which "topless dancing" is provided as "entertainment" to its patrons. After the effective date of Local Law No. 1 of 1973, the plaintiffs made their "entertainers" wear bikini tops so as to comply with Local Law No. 1 of 1973 (A 15).

On August 9, 1973, plaintiffs commenced an action for a declaratory judgment and moved by order to show cause for a preliminary injunction and temporary restraining order against enforcement of Local Law No. 1 of 1973 in the United States District Court for the Eastern District of New York. A hearing on the application for a temporary restraining order was held before Judge Dooling on August 14, 1974. Judge Dooling refused to issue a stay of enforcement of Local Law No. 1 of 1973. Argument on the motion for a preliminary injunction was set for August 17, 1974.

After the complaint in the action for a declaratory judgment was filed, and the request for a temporary restraining

order was denied, but before a hearing on the motion plaintiff M & L Rest, Inc. undertook to violate Local Law No. 1 of 1973 by once again providing topless dancing. On August 10, 1974 at 9:25 P.M. the Port Washington Police issued summonses for violation of Local Law No. 1 of 1973 to M & L Rest, Inc., to the owner thereof and its employees who were dancing.

On September 26, 1973, U.S. District Court rendered its decision holding Local Law No. 1 of 1973 unconstitutionally overbroad on its face in the declaratory judgment action and enjoined the enforcement thereof pending further proceedings. Defendant, Frank Doran, appealed to the United States Court of Appeals for the Second Circuit which rendered its decision on June 26, 1974 affirming the decision of the United States District Court, one judge dissenting.

Statement of changes in circumstances during pendency of the appeal

Pursuant to recommendation in Stern & Gressman, Supreme Court Practice 592, counsel for the appellant calls the Court's attention to certain facts reflecting upon this appeal which occurred during the pendency of the appeal, and prior to this Court noting probable jurisdiction.

On July 24, 1974, the Town of North Hempstead enacted Chapter 11 of the Code of the Town of North Hempstead, which law prohibited nudity in certain specifically enumerated places. This section of the Code of the Town of North Hempstead did not repeal Local Law No. 1 of 1973, to be considered upon this appeal.

This chapter of the Code of the Town of North Hempstead was held unconstitutionally overbroad as violative of the First and Fourteenth Amendments of the Constitution of the United States on September 10, 1974, by the United States District Court for the Eastern District of

New York. *Salem Inn, Inc.* v. *Frank,* 381 F. Supp. 859 (1974). In order to comply with the Federal Rules of Appellate Procedure a notice of appeal was filed and the appeal is in progress in the Second Circuit Court of Appeals. At pre-appeal conference held February 25, 1975 Appellant informed the Second Circuit that because of the pendency of this appeal, and because this Court has noted probable jurisdiction, Appellant would request argument in the Second Circuit be postponed until this Court renders its decision in this case.

The existence of Chapter 11 of the Code of the Town of North Hempstead and the proceedings in connection therewith does not, it is submitted, render this appeal moot for three reasons:

Firstly, the Code of the Town of North Hempstead did not repeal or effect the provisions of Local Law No. 1 of 1973 which is the subject of this appeal.

Secondly, issues presented in this appeal will be dispositive of the issues in the appeal of the decision overturning Chapter 11 of the Code of the Town of Hempstead. Disposition of the issues on this appeal in favor of constitutionality of Local Law No. 1 of 1973 will dispose of the necessity to proceed further in the case relating to Chapter 11 of the Code, because the questions therein will be rendered moot. Disposition of the issues of this appeal against the constitutionality of Local Law No. 1 of 1973 will resolve the issue whether topless dancing may be excluded by legislation on a local level. It will be unnecessary to proceed further in the Circuit Court of Appeals.

A question of the Federal interference with State administration of law is an issue to be resolved upon this appeal. The decision of the Second Circuit Court of Appeals allows any local law to be challenged at will in a federal forum upon the assertion of interference with constitutional rights, automatically divesting State courts of any right to review.

There is now a continuing controversy over restrictive legislation, enacted in furtherance of the health, safety and welfare of the municipality. So long as this controversy exists this appeal is not moot. See *Dunn* v. *Blumstein,* 405 U.S. 330; *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498; *Roe* v. *Wade,* 410 U.S. 113.

Summary of Argument

Point I will argue that Local No. 1 of 1973 of the Town of North Hempstead is a valid exercise of the police powers of the municipality, based upon a compelling governmental interest, is non-censorial and is no greater than necessary to accomplish its ends. That the legislative means chosen to further the health, safety and welfare of the community should not be subject to judicial review. Therefore, Local Law No. 1 of 1973 is constitutional.

Point II will argue that the definitions contained in Local Law No. 1 of 1973 sufficiently limit its application. By general rules of construction, this local law is sufficiently narrow so as to limit its application to conduct properly within the realm of regulation by the Town. The Courts below failed to properly construe Local Law No. 1 1973 and should be reversed.

Point III will argue that the application of the principles of overbreadth review in each court below was erroneous. Traditionally reserved to laws interfering with pure speech, the courts below extended this powerful exception beyond the narrow purpose for which it was created. As a result the Courts below granted Appellees relief not within the intent of the doctrine of overbreadth, and therefore the decisions should be reversed.

Point IV will argue that traditional principles of comity and equity render the decision of the District Court an unwarranted invasion into state criminal processes. The factual setting of the case at bar required a closer scrutiny.

The Circuit Court's reasoning in sustaining the District Court's decision further complicated the issue by establishing a "rush to the courthouse rule" which will create serious friction between Federal Courts and State Courts. Therefore, the decisions below should be reversed and the injunction lifted to allow the State prosecutions to proceed.

POINT I

Local Law No. 1 of 1973 of the Town of North Hempstead is constitutional.

In furtherance of the health, welfare, safety and good order of society, government of every level may legislate that which it deems proper to achieve this end. Police powers of government and their legitimate exercise are recognized in our law. *Boraas* v. *Village of Belle Terre,* 416 U.S. 1 (1974); *Street* v. *New York,* 394 U.S. 576 (1968); *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926). The legislative function of local government has traditionally been involved in the furtherance of the health, safety and welfare of the community which it serves. Local Law No. 1 of 1973, which was directed to the prohibition of "topless dancing" (A-13), was a proper and valid exercise of the police powers in furtherance of the legitimate governmental interest of the Town of North Hempstead.

The legitimate and compelling interests of government, as fostered by legislative enactments, may, if necessary, encroach upon individual interests and freedoms. Even those rights which are specifically guaranteed by the United States Constitution are not exempt from subservience to a compelling interest of Government. *United States* v. *O'Brien,* 391 U.S. 367 (1968).

Local Law No. 1 of 1973 of the Town of North Hempstead (A-11), prohibited nudity in specifically defined public places within the Town's territorial jurisdiction and was directed to end the public outcry against the establishments

which offered topless dancing as "entertainment" in furtherance of their economic interest (A-16, A-17-A-20). It is submitted that Local Law No. 1 of 1973 is a valid enactment of the legislature of the Town of North Hempstead, notwithstanding plaintiffs' claims that it abridges their constitutional rights of freedom of speech. Each of the courts below ruled the Local Law to be in violation of plaintiffs' rights upon the grounds the same was "overly broad," so as to . . . "'sweep within its ambit other activities that in ordinary circumstances constitute an exercise of Freedom of Speech.' *Thornhill* v. *Alabama,* 310 U.S. 88 (1940)" (J.S. 22a).

In reviewing Local Law No. 1 of 1973, it must be considered in the light of the forces which precipitated the legislation. The nuisance created by the bars offering topless "entertainment" is amply documented in the transcripts of the public hearing held prior to enactment of Local Law No. 1 of 1973 (A-29). Compelled by the necessity to act in accordance with the mandates of its populace in a substantially residential and suburban environment, suffering from the nuisances caused by the establishments—such as litter, noise, patrons' conduct, congestion, and proximity to schools where young children were in attendance—the Town Board adopted Local Law No. 1 of 1973. The elimination of the source of these nuisances was a most compelling governmental concern and interest.

The term "compelling governmental interest" is relative. A small municipality may have concerns which on a national scale would seem *de minimis.* These concerns are not so small to the municipality. A municipality must deal with the most basic elements of day to day living. It must provide for garbage removal, repair of streets and roads, and the enforcement of its zoning laws. The abatement of a nuisance in furtherance of the community welfare is a legitimate and compelling governmental concern. It is critical to the municipality that such con-

cerns be examined in relation to its day to day responsibilities and needs.

It was proper to exclude topless dancing by prohibition of nudity in "Bars, cabarets . . . or any other public place" (A-11). The method exercised by the legislative body to insure the health, safety and well-being of the community, is not a proper subject for review by this Court. The legislative discretion is supreme. *Boraas* v. *Village of Belle Terre,* 416 U.S. 1 (1973); *United States Civil Service Commission et al.* v. *National Association of Letter Carriers, AFL-CIO et al.,* 413 U.S. 548 (1973); *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926).

The decisions below are a departure from the principle that an overbreadth adjudication is a limited "exception to the traditional rules of practice." *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973).

Local Law No. 1 of 1973, undercut the nuisance at the source. The bar or cabaret, which created the problem could no longer provide this "entertainment." It was nothing more than a law directed at the source of the problem, which appellees sought to overturn. Misapplication of the rules of construction in the District Court, read into Local Law No. 1 of 1973 a far greater sweep, than its framers intended. (Point II, *infra.*) There was no ban on dancing, or providing entertainment, nor did it close the door of the established business. Its sweep was limited to what the legislature determined was a serious source of disruption to peace, good order, health and welfare of the Town of North Hempstead (A-11).

POINT II

The court below improperly construed the purpose and scope of Local Law No. 1 of 1973.

The Federal District Court for the Eastern District disregarded a well-established rule of statutory construction

when it held that Local Law No. 1 of 1973 was unconstitutionally overbroad. The court stated, in part:

> There is no limit to the interpretation of the term "any public place". It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance. The ordinance would also prohibit the production of the musical performance "Hair", which included a female topless performer but was protected against prosecution under a Massachusetts obscenity statute. See *P.B.I.C., Inc.* v. *Byrne, supra.* We, therefore, believe that on its face as drawn the ordinance is constitutionally invalid as an infringement upon plaintiffs' First Amendments freedoms. (J.S. 22a)

This statement by Judge Bartels ignores the rule of statutory construction known as *ejusdem generis.* Judge Bartels construed the ordinance to be overbroad because the term "any public place" could have myriad meanings. This is not true. The term "any public place" must be construed in the context of the terms that surround it. The general term is qualified and limited by the specific terms which precede it. This is rule of *ejusdem generis.*

> The *ejusdem generis* rule of statutory construction requires the court to limit general language of a statute by specific phrases which have preceded the general language, but the rule will not be applied where it contradicts the evident intent of the legislature. *McKinney's Consolidated Laws of New York Annotated, Statutes* § 239.

Under the rule of *ejusdem generis* the last phrase is confined to the subject matter in the phrases which preceded it.

In order to discern the true scope of the term in question, the District Court should have referred to the statement of legislative purpose which prefaced the ordinance. In that statement of legislative purpose, the term "other public places in general" is preceded by terms which are of such a nature as to confine the applicability of this ordinance to bars, lounges, discotheques, cabarets and dance halls (A. 11). There is no merit to the assertion that the terms could include, *inter alia*, a theater or an opera house. Therefore, such performance as "Hair" or the "Ballet Africains" would not be prohibited by Local Law No. 1 of 1973.

We respectfully submit that since the District Court felt that an exegesis of the term "any public place" would be dispositive of the issues of the constitutionality of Local Law No. 1 of 1973, under the maxim of ejusdem generis, it should have focused its analysis on the terms that preceded it, with the emphasis on the statement of legislative purpose. The court, however, chose to interpret the term independent of its surrounding terms and this resulted in a misapprehension of the true scope of the ordinance.

POINT III

The doctrine of overbreadth, reserved to questions involving pure speech, was erroneously applied to this case by the courts below.

Appellant urged in the courts below that appellees should establish that the legislation is overboard as applied to them (A-10). "As applied" is the cornerstone of such examination. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The sweep of Local Law No. 1 of 1973 is no greater than is necessary to achieve its legitimate end. See Point II, *supra*, *United States* v. *O'Brien*, 391 U.S. 367 (1968). It is submitted that the preamble and the body of the legislation manifest the intent of the legislature to prohibit topless dancing. The specific conduct prohibited cannot be questioned upon the readiing of the statute, nor can it be said that the statute is vague so as to prevent men of common intelligence to discern its meaning. *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926).

Each court below overlooked these considerations and erroneously concluded that the ordinance was overbroad.

This Court has recognized the distinction between purely verbal expression and expression incidental to conduct. *United States* v. *O'Brien*, 391 U.S. 367 (1968). The motion ". . . that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea" must be rejected. 391 U.S. 367. at 376. In *California* v. *La Rue*, 409 U.S. 109 (1972), this Court relying on *O'Brien*, upheld the validity of the California State Liquor Authority's regulations prohibiting topless and bottomless dancing in bars. The issues in this case are nearly identical and rely for resolution upon recognition of the dichotomy of pure speech and "speech-plus conduct", which is of paramount importance in expression cases. As expression devolve from pure speech toward pure conduct, the protection afforded decreases respectively, by degree. Dancing, even nude dancing, is conduct which in certain cases may contain elements of expression. To the extent it is expression, it is afforded First Amendment protection (J.S. 4a). *California* v. *La Rue* 409 U.S. 109 (1972). However, as conduct, the incidental expressive elements contained in topless dancing will yield to compelling governmental interests.

It is evident that the prohibitions contained in Local Law No. 1 of 1973 are directed towards conduct and not towards pure speech. Where conduct is the subject of the regulations, even if it contains elements of expression, the

legislation will be constitutionally valid, where it is merely an incidental interference, seeking to further a compelling governmental interest which can not otherwise be obtained. *United States* v. *O'Brien,* 391 U.S. 367 (1968).

Local Law No. 1 of 1973, is directed toward conduct rather than pure speech. *California* v. *La Rue,* 409 U.S. 109 (1972). Where conduct is involved, in order to establish overbreadth, there must be demonstrated, that the statute challenged interferes with protected activity, and that interference is not only real, but substantial. *Broadrick* v. *Oklahoma,* 416 U.S. 601 (1973).

Topless dancing contains a minimal amount of expression. *California* v. *La Rue,* 409 U.S. 109 (1972). It is only because this type of entertainment is in form "dancing", that it even adopts the color of expression. It must be concluded that topless "dancing" contains expression, which is "incidental". *California* v. *La Rue,* 409 U.S. 109 (1972). Various jurisdictions throughout the United States have adopted the position that topless dancing constitutes no more than the "commercial exploitation of nudity" thus reducing the expressive elements even further. *Wayside Restaurant, Inc.* v. *City of Virginia Beach,* 215 Va. 231, 208 S.E. 2d 51 (Supreme Court of Virginia 1974); *Seattle* v. *Hinkley,* 83 Wash. 205, 517 P. 2d 592 (Supreme Court of Washington 1973); *Crownover* v. *Musick,* 9 Cal. 3rd 405, 107 Cal. Rptr. 681 (Supreme Court of California 1973) (cert. den. 415 U.S. 931, 1974); *Yauch* v. *State of Arizona,* 19 Ariz. App. 175, 505 P. 2d 1066, 1973; *Major Liquors, Inc.* v. *City of Omaha,* 188 Neb. 628, 198 N.W. 2d 483 (Supreme Court of Nebraska 1972); *Portland* v. *Derrington,* 253, Ore. 289, 451 P. 2d 111 (Supreme Court of Oregon 1969) (cert. den. 396 U.S. 901, 1969); *Brandon Shores, Inc.* v. *Incorporated Village of Greenwood Lake,* 68 Misc. 2d 343, 325 N.Y.S. 2d 957 (Supreme Court Orange Co. 1971).

It is submitted, that because topless dancing is conduct with little, if any, expressive elements, it is not afforded absolute protection by reason of the First Amendment of

the Constitution. The Town of North Hempstead, therefore, may properly exclude this form of "entertainment" from its territorial jurisdiction as a proper exercise of the traditional police powers, based upon a compelling governmental interest.

Appellees have asserted that Local Law No. 1 of 1973 is overbroad "as applied". In order to establish overbreadth, it must be shown that the statute as applied, substantially interferes with constitutionally protected activity. *Younger* v. *Harris,* 401 U.S. 37 (1971). Substantiality of the interference is dependent upon the balance struck between the compelling governmental interest, furthered by the legislation, and the quantum of expression contained in the conduct prohibited. *United States* v. *O'Brien,* 391 U.S. 367 (1968). The error of the Courts below is grounded upon their failure to find the legislation overbroad "as applied" to appellees. The District Court, examined Local Law No. 1 of 1973 in its possible applications to conduct in which plaintiffs were admittedly not engaged. The application of an *Oklahoma* statute to other political conduct by civil servants, such as the wearing of political buttons and use of bumper stickers on personal automobiles, was not relevant, because no plaintiff then before the court had been subject to such restrictions. Prospective application of the statute will not be considered. Overbreadth adjudication is limited to the application of the statute to the conduct of the plaintiffs. *United States Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548 (1973); *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

There is no novelty to this rationale. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Overbreadth has always been an "exception to traditional rules" and limited to statutes which are aimed at spoken words. *Gooding* v. *Wilson,* 405 U.S. 518 (1972).

In these cases, this "strong medicine" has been administered "sparingly". *Broadrick* v. *Oklahoma,* 413 U.S.

601 (1973) at 613. A limiting construction or partial invalidation that may be applied to the statutes also removes the applicability of the overbreadth rules. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *California* v. *La Rue,* 409 U.S. 109 (1972); *Younger* v. *Harris,* 401 U.S. 37 (1971); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). In this light, appellees claim that Local Law No. 1 of 1973 would prohibit "Les Ballets Africans" or "Hair", cannot be the basis for a determination of overbreadth, because of the prohibition against vicarious assertion of the rights of others.

Similarly, appellees' conduct, nude dancing in the bar, would be prohibited no matter how narrowly the statute is construed. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). They do not stand in some nebulous area, in doubt of what they are or are not permitted to do. From at least the time the action was commenced, appellees knew what they could not do (A-16, A-17, A-19). Overbreadth assumes the applicability of a statute, to a plethora of conduct, some of which is, or may be protected by the constitutional guarantees. "A Chill" results from foregoing the exercising one's constitutional rights for fear the law will apply and hence constitute a violation. *Younger* v. *Harris,* 401 U.S. 37 (1971). "A Chill" cannot result unless a statute is overbroad in the sense that those who are affected cannot discern with certainty whether or not the law applies. It must be shown *ab initio* the activity is protected activity, and without possibility of regulation by some other narrowly drawn law. *Younger* v. *Harris,* 401 U.S. 37 (1971), at 47 n. 4. As the conduct prohibited more closely approaches that, which a state could validly prohibit by law, the further that conduct will move from inherent uncertainty of laws applicability. *California* v. *La Rue,* 409 U.S. 109 (1972).

Appellees cannot claim "facial overbreadth" of Local Law No. 1—1973. As applied to appellees, Local Law No. 1 of 1973 is a constitutional, incidental, and non-censorial limitation on conduct with minimal elements of expression.

POINT IV

The rule established in the Court below contravenes the traditional considerations of comity and equity, and will result in needless friction between State Courts and Federal Courts by creating "unseemly races" to the Federal Courts, in order to divest State Courts of any chance to dispose of issues, of constitutional claims in criminal matters.

Issues in this case relating to relationship of Federal Courts and State Courts, and the exercise of jurisdiction by courts below, raise serious questions which leave unchecked the possibility of serious friction between the two. Basic considerations of equity and comity, long standing in the relationship of Federal and State Courts, has recognized the supremacy of each within its delegated sphere.

Federal injunctive relief, so drastic a remedy, has been, in most cases avoided, where State criminal processes were already in motion at the time Federal action was instituted. In *Younger* v. *Harris,* 401 U. S. 37 (1971), at 45. This action raises a question as to the propriety of a Federal Court's action which results in the arrest of a state criminal action brought in good faith.

The propriety of injunctive and declaratory relief against state criminal proceedings has been examined by this Court in *Younger* v. *Harris,* 401 U. S. 37 (1971), and its companion cases, *Samuels* v. *Mackell,* 401 U. S. 66 (1971); *Boyle* v. *Landry,* 401 U. S. 77 (1971); *Perez* v. *Ledesma,* 401 U. S. 81 (1971); *Dyson* v. *Stein,* 401 U. S. 200 (1971); *Steffel* v. *Thompson,* 415 U. S. 452 (1974), was interpreted as a discretionary void in which the Court below assumed it was free to establish guidelines as to when interference with state judicial processes was proper. In this case this new "clear cut, reliable and equitable guide" (J.S. 7a) has resulted in an unwarranted extension of federal interference with state judicial processes.

Comity has in most instances minimized the friction between the Federal and State courts. When questions of Federal deference to State courts have arisen, considerations of equity have always been paramount in resolving the issue or conflicts. The determination of whether or not a Federal Court should abstain should examine every equitable reason to act or defer in each individual case. In this case we submit that equitable considerations should have determined the issues in favor of Federal absention. The State prosecution of intentional overt violation of a local law, entitled to the presumption of constitutionality, has been instituted one day after filing of a complaint in the Federal Court.

In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the availability of Federal injunctive relief against a state criminal statute was expanded and the rules clarified to make available against prior state proceedings upon showing that certain specifically defined circumstances existed mandating its powerful use. *Younger* and its companion cases crystallized the rules established in *Dombrowski,* by application of these principles of equity to individual cases in order to determine, in each such instance, if plaintiff had established sufficient facts to warrant Federal injunctive relief. In application of principles of *Dombrowski,* and specifically in the case of *Younger,* this Court noted that demonstration of "overbreadth" alone is not sufficient to warrant such powerful intervention, absent the "extraordinary circumstances" of irreparable injury, and demonstrative evidence of bad faith and harassment.

No such claim of bad faith or harassment was presented in the courts below. A determination of the irreparable injury was a factor considered by each court below in application of the *Dombrowski* rationale to the plaintiffs herein (J.S. 4a). A showing of irreparable injury does not of itself justify Federal intervention without bad faith, and harassment. *Younger* v. *Harris,* 401 U.S. 37 (1971). *Younger* mandates a far more powerful case be presented

by plaintiffs, demonstrating great and immediate irreparable harm. The mere allegations of appellees in the district court, it is submitted, were not sufficient to bring them within this exception in *Dombrowski.*

More important than the misapplication of these principles, is the result obtained by reason of these guidelines established by the court below (J.S. 7a). The race to the courthouse door, (cf. Dissenting Opinion of Lumbard, J. (J.S. 10a)) inherently overlooks the safeguards afforded all parties by *Younger's* application of *Dombrowski's* principles.

A case by case evaluation is required for each federal court called to review a statute, under which no state proceeding had commenced, in order to determine if the requisites of *Dombrowski,* were present. If its existence were established, it is unquestioned that federal intervention would be proper in favor of a person who would suffer immediate harm and irreparable injury. However, what hardship may arise incident to every state prosecution, is of itself insufficient to justify equitable relief. *Dombrowski,* 380 U. S. 379 (1965); *Younger* v. *Harris,* 401 U. S. 37 (1971). Likewise, mere overbreadth, claimed by plaintiffs, based on a "chill" may occur to others, cannot alone justify Federal intervention. (*Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973); *United States Civil Service Commission, et al.* v. *National Association of Letter Carriers, AFL-CIO, et al.,* 413 U. S. 548 (1973).

The danger of the rule created by Court below, is manifest. Even when first presented with the case, Federal Courts should closely examine the underlying facts and circumstances of each case, which examination should continue throughout the proceedings. *Younger* v. *Harris,* 401 U.S. 37 (1971) at 49.

A more compelling reason to abstain can be found in the fact that one plaintiff began to violate Local Law No. 1 of 1973 one day after the District Court refused to issue a

temporary restraining order (A-21). If equitable considerations are determinative of borderline cases, as the Circuit Court plainly ruled (J.S. 3a), one who seeks equity must come to court with clean hands. The court below found two of three plaintiffs to have clean hands, and refused to deny relief to the third. In justification of its action, the court below relied upon this Court's decision in *Steffel* v. *Thompson,* 415 U.S. 452. (1974).

Steffel is distinguishable from the instant case in that only the propriety of declaratory relief was in issue; plaintiffs therein had standing to challenge the statute "as applied," and not upon some speculative applications of the law, to the derogation of rights other than their own. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1974).

In this case prosecutions were self-generated. Because Local Law No. 1 of 1973 was not unconstitutional "as applied," the fact of the existence of state proceedings, even though initiated one day subsequent to the filing of this action, should have propelled the consideration of the District Court in favor of referring to the state adjudication. *Younger* v. *Harris,* 401 U.S. 37 (1971). The constitutionality could have and should have been determined in that forum.

The Court below had knowledge of the pending state prosecution (A-21). The courts below could have—at any stage of the proceedings—released the claims to the state courts. *Younger* v. *Harris,* 401 U.S. 37 (1971), Steffel does not stand for the proposition that once an action is commenced, a violation of the law can be *ignored,* especially in light that comity demands the Federal Court recognize the capability of the State Court to fairly dispose of every issue, even those of constitutional infringement. *Douglas* v. *City of Jeannete,* 319 U.S. 157 (1943).

Compounded as it is by the error of the District Court in application of the rules of overbreadth determinations (though not controlling), *Steffel* v. *Thompson,* 415 U.S.

452 (1974), some consideration should have been given to whether or not the State Court could have with similar speed and justice made a dispositive decision on the merits of appellees' claims in the criminal proceeding (J.S. 11a). In the very broadest of reading of the rules in Steffel, the courts below should have abstained as to M & L Rest, Inc. The rule the Court of Appeals has established renders an immediate divestiture of state powers of enforcement of any criminal statute upon the filing of the Federal complaint for declaratory relief (J.S. 14). Even if a plaintiff chances losing in the Federal Courts, and thus faces eventual prosecution, the converse of the state being stayed in enforcing the law through the time of pendency of the Federal declaratory action and appeals therefrom may be far more disruptive to order, society and welfare. A more drastic interference with State criminal processes is difficult to imagine. It is, therefore, more compelling to allow the state to proceed, than to tie the hands of state prosecutors (J.S. 14a). The "Alphonse-Gaston routine" (J.S. 7a), cannot result and we must assume local prosecutors will respect the law. *Steffel* v. *Thompson,* 415 U.S. 452 (1974), therefore, must be read in its limited sense as in Mr. Justice Stewart's concurring opinion that, absent objective showing of a chill due to fear of arrest and some corroboration of the chill, the plaintiffs lack . . . "an actual concrete controversy between himself and the Agents of the State." The controversy in this case did not arise until after the federal action was commenced. It was created after the fact. Since the case at its inception lacks the controversy under *Steffel* rationale, the dissent in the Circuit Court demonstrates astute observation of the error, in ". . . the fact of which court is first presented with question seems a clear-cut reliable guide . . ." (J.S. 7a) creates "unseemly races . . ." (J.S. 12a). The absence of a hard and fast rule should not be decried because equity is by nature liquid. Comity is a two-way street of mutual respect and forbearance between the courts of the state and of the na-

tion. *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943). The Federal Court must recognize the capability of the State Court to fairly dispose of every issue, even those of constitutional infringement (J.S. 14a).

For these reasons, the courts below should have abstained, and remitted the determinations in this case to the courts of New York.

CONCLUSION

Local Law No. 1 of 1973 of the Town of North Hempstead is a constitutional exercise of the police powers, and the courts below should be reversed.

Respectfully submitted,

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